

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.
--

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JUDY LYNN DUPRE,

Defendant and Appellant.

D038978

(Super. Ct. No. SCE215254)

APPEAL from a judgment of the Superior Court of San Diego County, Herbert J. Exharos, Judge. Affirmed.

Judy Lynn Dupre pleaded guilty to violating her duty to stop and report a vehicular injury-producing accident (Veh. Code, § 20001, subd. (a)) and admitted the accident resulted in death. (Veh. Code, § 20001, subd. (b)(2).) The court sentenced her to prison for the middle term of three years. Dupre appeals, contending the court abused its discretion by denying her request for probation. We affirm the judgment.

FACTS

On July 27, 2001, Dupre and her friend Patricia Wilson left Sycuan Casino in Dupre's truck after arguing. Dupre drove to a nearby construction site where Wilson's boyfriend was working. Wilson and her boyfriend shoved and hit Dupre. Dupre drove away with Wilson, who continued to hit her until Dupre stopped the truck and Wilson got out. Dupre drove from the area but soon returned. Wilson ran toward her. Dupre's truck's sideview mirror hit Wilson, causing her to fall underneath the truck. Dupre drove away and did not assist or summon help for Wilson. Wilson died a week later.

DISCUSSION

A

Probation is an act of clemency within the sound discretion of the trial court. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831.) The court's order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion. (*Ibid.*) On appeal, we determine whether the trial court's order is arbitrary or capricious, considering all of the circumstances. (*People v. Downey* (2000) 82 Cal.App.4th 899, 909.) We presume the trial court acted to achieve legitimate sentencing objectives. (*People v. Superior Court (Du)*, *supra*, 5 Cal.App.4th at p. 831.)

B

Citing *People v. Scott* (1994) 9 Cal.4th 331, the People assert Dupre waived any claim of sentencing error, including denial of probation, by not objecting at the sentencing hearing. In *Scott*, the defendant challenged his sentence on appeal, contending the court erred under Penal Code section 654 by sentencing him on some

counts, double-counting certain aggravating factors, citing factors that did not apply and improperly weighing the aggravating and mitigating factors. (*People v. Scott, supra*, 9 Cal.4th at p. 340.) The Supreme Court held "complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal." (*Id.* at p. 356.) The court reasoned that counsel is charged with understanding, advocating and clarifying permissible sentencing choices. "Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353.) Thus, a criminal defendant cannot argue for the first time on appeal that the court imposed unreasonable probation conditions, aggravated a sentence based on erroneous or otherwise flawed information contained in a probation report, or stated no reasons for a sentencing choice. (*Id.* at pp. 351-352.)

Here, the record does not support application of the waiver doctrine. Defense counsel objected to imposition of a prison term by arguing for probation. After the court rejected probation and selected the middle term, counsel was not required to further object to preserve the issue for appeal. Dupre is not challenging the court's statement of reasons for its sentencing choice or seeking clarification or change because of ambiguity, error or omission in the court's reasoning. Thus, the holding in *Scott* does not preclude appellate review.

C

When a defendant is eligible for probation, the court must state its reasons for selecting prison as its sentencing choice. The requirement to state reasons is satisfied by an explanation of why probation has been rejected in favor of imprisonment. (*People v.*

Leung (1992) 5 Cal.App.4th 482, 506.) The facts supporting the court's sentencing choice need be established only by a preponderance of the evidence. (*Ibid.*)

Here, the court read the probation report, considered impact statements from the victim's family and heard argument of counsel. The court then gave a lengthy and reasoned explanation for its sentencing choice:

"[A]s hit and runs go, this is by far not a technical hit and run. This is perhaps one of the more aggravated hit and runs that has come before the court.

"Traditionally, you have a hit and run that was no fault [of] the driver who is involved in the accident. If there were no injuries, it is a misdemeanor. If there were injuries or death, it is a felony.

"The responsibility and the purpose behind the hit and run statute is accountability and to assist the victim, if there is any injury.

"In this instance, there was a collision, an accident, call it what you will, which ultimately resulted in the death of the victim. The obligation at that time immediately is upon [Dupre] to comply with the requirements of that section, which are quite simple, and given the state of the evidence, had [Dupre] complied with those requirements, there would be no crime . . . [¶] . . . [¶]

"But this is not a technical violation where she strikes a pedestrian on the shoulder, through no fault of her own and in her grief and shock flees the scene until she comes to her senses.

"This involves the death of a person whom she knew, who was a passenger in her vehicle, and whose death she was involved [in], perhaps as an act of self-defense, perhaps as an accident. We will never know because the only person who knows the answers to those questions is Miss Dupre, and she has given such differing versions of what happened on that date that none of them are really believable. [¶] . . . [¶]

"The fact that she returned thereafter, after she regained her composure, would mean that this was a technical violation and one

worthy of probation. She did not. Not the next morning. Not that weekend. Not the next day. [¶] . . . [¶]

"The fact remains that a significant period of time went by when a person known by her was lying by the side of the road, fatally injured, and what did she do about it? Nothing, except fabricate explanations.

"It was callous. And to say that there is remorse, it is not borne out by the facts. There is nothing in this report, nothing in her conduct after that incident that indicates any kind of remorse, other than as to her predicament.

"I find that she is not a fit or appropriate candidate for a grant of probation, notwithstanding her lack of any prior criminal history"

The court properly found the nature, seriousness and circumstances of the crime, compared to other instances of the same crime, justified denying probation. (Cal. Rules of Court, rule 4.414(a)(1).)

Dupre contends probation was appropriate because there are no facts to suggest she deliberately hit or aimed her truck at Wilson. However, the gravamen of felony hit and run is not the initial injury of the victim, but leaving the scene without presenting identification or rendering aid. (*People v. Wood* (2000) 83 Cal.App.4th 862, 866.) Dupre knew she hit and injured Wilson but nevertheless left the scene and did not provide or seek assistance for her. After Dupre later learned Wilson was seriously injured, she contacted an attorney and waited more than two weeks before contacting the police. Dupre's callousness and avoidance of responsibility shows the seriousness of the crime, justifying the court's decision to deny probation.

Dupre asserts the court should not have rejected the probation officer's recommendation for probation because numerous mitigating factors were presented. However, although the court is required to read and consider the probation report (Pen. Code, § 1203), it need not adopt the probation officer's sentencing recommendation. (*People v. Delson* (1984) 161 Cal.App.3d 56, 63.) Having fully considered the various sentencing factors argued by both the prosecutor and defense counsel, the court did not abuse its discretion by denying probation and imposing the middle term.

DISPOSITION

The judgment is affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.